log should be deemed a waiver of the right to assert any privileges.

BNSF seeks certiorari because the Ninth Circuit's decision rewrites the Federal Rules, imposing requirements that cannot be found anywhere in the Rules and that are contrary to long-standing practice. In addition, the decision conflicts with the approach taken by the D.C. Circuit, as well as with the weight of authority in the district courts, which regards "waiver of a privilege [as] a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." *United States v. Philip Morris Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (internal quotations omitted). The Ninth Circuit's decision, by contrast, sets a trap for unwary litigants (and their counsel), subjecting them to the draconian penalty of a wholesale privilege waiver simply because the court, in hindsight, believes that a privilege log could have been produced more expeditiously.

The question of when and how privileges must be asserted is of great importance to the administration of justice in the federal system. It is rare in modern civil litigation that discovery requests are *not* drafted broadly enough to include documents that are at least arguably privileged or protected from discovery by the work product doctrine. In light of the "vital role the privilege plays in the administration of justice," *American Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y*, 406 F.3d 867, 878 (7th Cir. 2005), it is critical that the rules governing the assertion of privileges be clear and that enforcement of those rules strike a proper balance between advancing discovery and protecting privileged communications. For the reasons outlined below, the Ninth Circuit's decision fails in both respects, leaving litigants without clear guidance and imposing a wholly disproportionate penalty for delaying the production of a privilege log without regard to whether that delay had any impact on the course of discovery.

A. Proceedings in the Trial Court.

This is a case brought by private landowners against BNSF seeking damages for alleged groundwater contamination from a nearby railyard. In the three years this case has been pending, plaintiffs have served fourteen sets of discovery requests on BNSF, asking it to produce dozens of different categories of documents created over the course of many decades. In every instance, BNSF has responded to plaintiffs' requests in a timely fashion, producing over 78,000 pages of documents.

When it served its Rule 34 response to plaintiffs' first request for documents in December 2002, BNSF lodged a general objection to plaintiffs' requests "to the extent that they purport to require BNSF to provide information that is protected from disclosure by the attorney-client privilege [or] the work-product doctrine." C.A. Exh. 7B at 1-2. In addition, BNSF made specific objections on privilege or work product grounds to six of plaintiffs' requests. For example, it objected to a request for all copies of "written notes, summaries, tapes, statements and/or interview transcripts you and/or your agent(s) have taken or obtained from any witness in this matter," on the ground that the request sought "materials protected by the attorney/work-product privilege." *Id.* at 4.

BNSF lodged multiple objections to some requests. Request No. 8, for example, asked for "any documents BNSF ever generated, maintained and/or received at any time . . . regarding the hazardous nature and/or toxicity of" certain chemicals used at the railyard. C.A. Exh. 7B at 7. BNSF objected to this request on the ground that it was overbroad and unduly burdensome, was not reasonably calculated to lead to the discovery of admissible evidence, and called for the production of privileged documents. *Id.* at 8. At the same time, BNSF noted that it would be producing specific categories of non-privileged documents responsive to this request. *Id.*

When BNSF responded to plaintiffs' first request for production, it had begun the laborious process of preparing a privilege log listing all of the documents it would be withholding from production on privilege or work product grounds. As is customary, BNSF did not attempt to postpone its Rule 34 response until it completed that log. Instead — just as plaintiffs themselves did when they later answered BNSF's discovery requests — BNSF served a response within the 30-day period called for by Rule 34, generally objected to producing privileged documents, and left both the production of documents and the transmission of a privilege log to a future date.

Four months later, on April 7, 2003, plaintiffs filed a motion to compel in which they argued that BNSF should be required to organize the large volume of documents it had already produced in a way that corresponded to the various categories in plaintiffs' requests. Plaintiffs also complained that BNSF had not yet provided a privilege log. Plaintiffs did not argue that BNSF had waived its right to assert any privileges. Instead, they simply asked the magistrate who was supervising discovery to order BNSF to provide a privilege log. *See* C.A. Exh. 5, attach. 2, at 7-8.

Three weeks later, before the magistrate ruled, BNSF gave plaintiffs a privilege log. Plaintiffs were apparently satisfied, because they made no further mention of the issue.

After plaintiffs received BNSF's first privilege log, they served multiple additional discovery requests. BNSF responded to each one in a timely manner, reiterating its objection to producing documents protected by the attorney-client privilege and work product doctrine. As additional documents were requested by plaintiffs and located by BNSF, BNSF revised and supplemented its privilege log, as required under Rule 26(e).

On January 21, 2004, plaintiffs filed a motion to compel production of all of the 1,023 documents identified on BNSF's privilege logs through January 9, 2004, arguing for the first time that BNSF had waived any claim of privilege or work product protection by not providing the log when it served its Rule 34 response more than a year earlier, on December 9, 2002. C.A. Exh. 4, at 6-8. Alternatively, plaintiffs argued that 393 of the documents were not properly characterized as attorney-client communications or work product. *Id.* at 8-18.

On March 15, 2004, the magistrate granted plaintiffs' motion to compel production of all of the documents listed on BNSF's logs. The magistrate rejected BNSF's argument that the general objections made in its Rule 34 response were sufficient to preserve its privilege objections. He held that Rule 26(b)(5) requires a privilege log to be served contemporaneously with Rule 34 responses and that the privilege is automatically waived if a timely log is not provided: "where the privilege objection is not correctly and timely made, it is deemed waived." App., *infra*, 14a.[1]

BNSF filed timely objections to the magistrate's decision in the district court, arguing that waiver ought to be reserved as a sanction for a deliberate failure to cooperate in discovery and should not be the automatic consequence of a delay in providing a privilege log. The district court summarily rejected BNSF's objections, holding that the magistrate had "properly applied the plain meaning of Rule 26(b)(5) to the facts of this case" and that his decision was therefore not clearly erroneous or contrary to law. App., *infra*, 17a.

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[1] The magistrate also rejected BNSF's argument that plaintiffs had forfeited any waiver claim they might have had by failing to assert it for a year after they received BNSF's Rule 34 discovery objections. App., *infra*, 13a.

BNSF obtained a stay of the magistrate's order and filed a mandamus petition in the Ninth Circuit. The Ninth Circuit granted full briefing and heard oral argument and then issued a published opinion that denied the petition, but provided guidance on what the panel acknowledged to be an important issue of first impression.

B. The Ninth Circuit's Opinion.

The Ninth Circuit noted that "[t]wo propositions are embedded in the [magistrate's] assertion" that BNSF had waived its privilege objections. App., *infra*, 5a. The first is that "a general, boilerplate assertion of an evidentiary privilege" in a Rule 34 response "does not satisfy the demands of Rule 26(b)(5) and Rule 34, when read together" and thus is not a "proper assertion of the privilege." *Id.* at 5a-6a. The second proposition is that the effect of untimeliness in properly asserting the privilege is that the privilege is deemed waived or otherwise abandoned. *Id.* at 6a. The Ninth Circuit concluded that the magistrate was right on the first proposition, but not necessarily on the second.

The court acknowledged that Rule 34 does not describe how a privilege objection must be made and "does not contain an explicit prohibition against boilerplate objections." App., *infra*, 6a. But the court read Rule 26(b)(5) as "clarif[ying]" Rule 34 and requiring that an objection be more specific than a "generalized, boilerplate objection." *Id.* The court noted that Rule 26(b)(5) does not "specifically correlate the requirement" that the responding party provide a description of the documents being withheld with the "bright-line rule for timeliness" in Rule 34 and that neither rule explicitly provides for a waiver. *Id.* It also observed that neither the Advisory Committee Notes, nor "[j]udicial construction of the rules . . . resolve[s] the issue." *Id.* at 7a-8a.

As the court explained, "[n]o Circuit has explicitly weighed in on the precise content of Rule 26(b)(5)'s notice requirement, nor on its relationship to Rule 34's deadline." App., *infra*, 8a. And district court decisions on the issue are a "very mixed bag, running the gamut from a permissive approach where Rule 26(b)(5) is construed liberally and blanket objections are accepted, to a strict approach where waiver results from failure to meet the requirements of a more demanding construction of Rule 26(b)(5) within Rule 34's 30-day limit." *Id.* The Ninth Circuit stated that "[i]n order to honor the spirit of the rules, we now chart a middle road," rejecting the "per se waiver rule" adopted by the magistrate in favor of a "case-by-case" determination. *Id.* at 9a. The court held that, in making that "case-by-case" determination, the judge overseeing discovery should employ a "holistic reasonableness analysis," considering

> the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy (such as, here, the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard.

Id. at 9a-10a.

Applying this new standard to the facts before it, the court concluded that the magistrate had not clearly erred in concluding that BNSF had waived its right to claim any

privilege. App., *infra*, 10a. The court characterized BNSF's objections as insufficient and stated that the five-month interval between its Rule 34 response and the service of a privilege log was enough, in the absence of mitigating circumstances, to support the lower court's ruling. Although the lower court had made no findings on the reasonableness of BNSF's conduct, the Ninth Circuit assumed that BNSF could have produced a log at an earlier point in time because it was a "repeat player" in litigation involving the site in question and held that its failure to do so could therefore be deemed a waiver. *Id.*

BNSF filed a timely petition for rehearing and rehearing en banc. The Ninth Circuit denied the petition, but amended its opinion to (among other things) explain that in the future litigants could avoid waiving privileges by seeking an extension of time, either by agreement or from the court, to provide a privilege log. App., *infra*, 18a-20a.

Before the mandamus petition was filed, the magistrate had entered a stay of his order compelling BNSF to produce the documents on its privilege log "pending further Order of the Court." That stay remains in effect. C.A. Exh. 3, at 2.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION EFFECTIVELY REWRITES THE FEDERAL RULES.

Rule 34 requires a litigant who has received a request for production of documents to respond to the request within 30 days by stating, with respect to each item requested, either that it will comply with the request or that it objects. If the responding party objects, Rule 34(b) requires it to state "the reasons for the objection." Rule 34(b) does *not* require the responding party to produce the requested documents contemporaneously with the service of the response. Furthermore, as the Ninth Circuit observed, Rule 34(b) "does

not contain an explicit prohibition against boilerplate objections or assertions of privilege." App., *infra*, 6a.

Prior to the adoption of Rule 26(b)(5) in 1993, there was a split of authority as to what a party was required to do in order to make an effective objection under Rule 34(b). Some courts held that general privilege objections were insufficient and that the responding party was required to provide a description of the documents being withheld at the time a Rule 34 response was provided. *See, e.g., Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182 (E.D. Cal. 1991). Other courts, however, held that a general objection was sufficient so long as it was clear that responsive documents were being withheld on privilege grounds. *See, e.g., In re Richardson-Merrill, Inc. Bendectin Products Liab. Litig.*, 97 F.R.D. 481, 484 (S.D. Ohio 1983); *see also Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1362 (Fed. Cir. 1990) (a general objection claiming that documents were confidential was sufficient to constitute a proper response under Rule 34).

Rule 26(b)(5) provided some clarification, but did not end the debate. That Rule provides that "[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly." The Advisory Committee Notes to this new provision explain that it was designed to ensure that a party gives notice to the other side if it is withholding documents on privilege grounds. The Notes explain that "[t]o withhold such materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection."

After requiring notice that documents are being withheld, Rule 26(b)(5) goes on to provide that the withholding party "shall describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the

applicability of the privilege or protection." Neither the Rule itself nor the Advisory Committee Notes explain *when* the required description of the documents must be provided. *See Jackson v. County of Sacramento,* 175 F.R.D. 653, 656 (E.D. Cal. 1997) (noting that the Rule is silent on the timing issue and therefore the "duty to provide the description required by Rule 26(b)(5) is flexible and does not arise until there is a good faith challenge to the privilege claim"); *Emerson Elec. Co. v. Ouellette,* 1998 WL 34088465 at *8 (D.N.H. May 12, 1998). Furthermore, the Advisory Committee Notes confirm that the Rule intentionally "does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection," leaving that determination to each individual case.

Significantly, there is nothing in the rules or commentary suggesting that a party must comply with all of the requirements of Rule 26(b)(5) when it serves a Rule 34 response. Indeed, the language of Rule 26(b)(5) appears to be directed to the point in time at which documents are produced — "[w]hen a party withholds information" — rather than to the (earlier) point in time when a party serves its Rule 34 response, making its objections and stating what it intends to produce. Moreover, the Advisory Committee Notes "mention waiver of the privilege or protection as a sanction only for failure to expressly assert the privilege, not for failure to produce a privilege log." *United States v. Gericare Medical Supply, Inc.,* 2000 WL 33156442 at *6 (S.D. Ala. Dec. 11, 2000).

Thus, the Rules themselves allow for flexibility, not only with respect to the nature of the information that must be provided, but also with respect to when a privilege log must be provided to the opposing party. Having flexibility with respect to timing makes sense because, particularly in document-intensive cases, Rule 34 responses are often filed before the responding party has had an opportunity to review all of the

responsive documents — let alone to generate a full-blown privilege log.

If no specific deadline is imposed for providing a privilege log, then the waiver calculus is fundamentally altered. If there were a clear and unequivocal deadline for providing a log, it would be reasonable to treat the failure to provide a log in a timely fashion (or to seek an extension of time) as an intentional relinquishment of the right to object to producing documents on privilege grounds. *See Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("waiver is the intentional relinquishment or abandonment of a known right") (internal quotations omitted). But in the absence of a clear deadline, the fact that there was a gap in time between the service of a Rule 34 response that included privilege objections and the provision of a log does not provide any basis for inferring an intent to waive the privilege — or for imposing a forfeiture for failing to timely assert a privilege.[2]

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE APPROACH TAKEN BY THE D.C. CIRCUIT AND THE WEIGHT OF AUTHORITY IN THE DISTRICT COURTS.

Although it rejected the "automatic waiver" rule adopted by the magistrate in this case, the Ninth Circuit itself adopted a presumptive waiver rule. Thus, the court held that general objections in a Rule 34 response are presumptively insufficient and that any significant delay in providing a privilege log would give rise to a waiver unless the party was able to persuade the

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[2] As the Court observed in *Kontrick*, "[a]lthough jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." 540 U.S. at 458 n.13 (internal quotations omitted).

trial court that a log could not have been prepared at an earlier point in time. The Ninth Circuit characterized this approach as "chart[ing] a middle road through the wide spectrum of caselaw regarding discovery." In fact, however, "[t]his decision is not middle of the road; it rides the right shoulder of a six-lane highway." J. Solovy & R. Byman, *Blanket Objections*, NAT'L L.J., June 6, 2005, at 12.

The Ninth Circuit's decision that waiver can result merely from delay in providing a privilege log is contrary to the approach taken by the D.C. Circuit and to the great weight of authority in the district courts. In *United States v. Philip Morris Inc.*, one of the defendants filed an interlocutory appeal from an order requiring it to produce a document that it claimed was privileged.[3] The trial court in that case had concluded that the privilege was waived because the document was not included on the defendant's privilege log. The D.C. Circuit reversed, directing the trial court to consider on remand whether the defendant's objections to the scope of the document requests (which, if granted, would make the document non-responsive) should be sustained. If those objections were overruled, the trial court was instructed to consider whether the defendant should be given the opportunity to add the document to its privilege log or whether the failure to do so previously should be deemed a waiver. The D.C. Circuit explained that "[w]aiver

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[3] The D.C. Circuit allows interlocutory appeals from orders that compel the production of arguably privileged documents under the collateral order doctrine. *See United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003). The Ninth Circuit, on the other hand, has concluded that "discovery orders are not final, appealable orders under 28 U.S.C. § 1291." *S.G. Cowen Sec. Corp. v. United States Dist. Court*, 189 F.3d 909, 913 (9th Cir. 1999). Thus, mandamus was the only avenue available to BNSF to seek appellate review of the district court's order.

is not automatic," noting that "[a]s the federal rules, case law and commentators suggest, waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." 347 F.3d at 954, quoting *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 902 F.Supp. 1356, 1361 (D. Kan. 1995). The court also cited with approval 8 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2016.1 at 234-35, which explains that "[u]nless there has been a bad-faith failure to comply with a reasonable identification effort, automatically finding a waiver of the privilege would be unduly harsh."

In case after case district courts have refused to deem privileges waived even when they have concluded that a privilege log was not provided in a timely manner. For example, in *Public Service Co. v. Portland Natural Gas*, 218 F.R.D. 361 (D.N.H. 2003), the court reversed a magistrate's order compelling the production of privileged documents on the ground that a failure to provide a privilege log along with the discovery response waived the privilege. The court accepted the magistrate's determination that the party's failure to provide a privilege log along with its discovery response violated Rule 26(b)(5). But the court rejected the magistrate's ruling that waiver was automatic, holding that "[a] failure to comply with Rule 26(b)(5) . . . should be enforced under Rule 37." 218 F.R.D. at 364. The court noted that under Rule 37(a) "most failures to comply with discovery obligations initially expose a recalcitrant party only to an order compelling it to comply and requiring it to pay the requesting party's associated costs and legal fees." Citing Rule 37(b), the court went on to observe that "[h]arsher sanctions . . . come into play only if a party fails to obey a court order compelling a response." *Id.* at 363. Applying these principles to the imposition of sanctions for violating Rule 26(b)(5), the court concluded that it would be "unnecessarily harsh" to make a waiver finding "when the responding party invokes a privilege but initially fails to produce a privilege log

with its discovery responses." *Id.* The court then went on to hold that "an award of attorneys' fees and costs ordinarily will be a sufficient sanction if" — as BNSF did here — "the requesting party invokes a privilege and produces its privilege log late, but before it is ordered to do so." *Id.* at 364.

Other cases reach the same result. In *Heavin v. Owens-Corning Fiberglass*, 2004 WL 316072 (D. Kan. Feb. 3, 2004), the court found that the defendant was late in providing a privilege log and that the log it provided was inadequate; nevertheless, the court refused to conclude that the defendant had waived any protection for the documents in question. Instead, the court simply ordered the defendant to submit a more detailed log. Similarly, in *Stevens v. Omega Protein, Inc.*, 2002 WL 1022507 at *3 (E.D. La. May 16, 2002), the court declined to impose the "draconian remedy of waiver" for failure to provide a privilege log, instead "requir[ing] plaintiff to do what he should already have done, i.e., provide the log required by Rule 26(b)(5)." The court stated that failure to provide the log in compliance with the court's order would result in a waiver of plaintiffs' privilege objections. *Accord Bernofsky v. Tulane Univ. Med. Sch.*, 1996 WL 198118 at *2 (E.D. La. Apr. 22, 1996) (requiring defendant to provide a privilege log and stating that failure to do so would result in a waiver of the privilege); *Mader v. Motorola Inc.*, 1994 WL 535125 at *10 (N.D. Ill. Sept. 30, 1994) (finding plaintiffs' motion to compel premature where defendant had not yet provided a privilege log and ordering defendant to do so).

Under the rationale of these cases, an inadequate assertion of a privilege does not lead to either an automatic or a presumptive waiver of the privilege. Instead, it should be treated like any other failure to fully comply with discovery obligations: the court should first consider the proper remedy to enforce compliance (ordinarily ordering production of a privilege log) and then consider whether the party's conduct was so egregious

that it warrants the imposition of a sanction under Rule 37. Even if a sanction is deemed appropriate, however, the "draconian remedy of waiver" should be reserved for cases of bad faith, refusal to comply with court orders, and demonstrated prejudice to the opposing party. Contrary to the Ninth Circuit's decision, waiver is never an appropriate sanction merely for a delay in providing a privilege log — particularly when, as in this case, the log is ultimately provided without any need for judicial intervention.

III. THE NINTH CIRCUIT'S NEW RULE UPENDS DECADES OF ESTABLISHED DISCOVERY PRACTICE AND OPENS A PANDORA'S BOX OF CONFUSION LEADING TO DELAY AND INADVERTENT PRIVILEGE WAIVER

If it is not reversed by this Court, the Ninth Circuit's rewrite of Rules 26 and 34 will profoundly impact the day-to-day functioning of document discovery, particularly in complex civil litigation. Practitioners in the federal courts who followed the long-standing practice of supplying a privilege log after documents have been produced may find that they have inadvertently waived all of their client's privileges. That the Ninth Circuit applied its newly-announced rule retroactively to BNSF will encourage a cottage industry in waiver claims as discovery gamesmanship trumps efficiency. Indeed, the ink was barely dry on the Ninth Circuit opinion before parties starting crying "waiver!" as a result of their opponent's failure to serve a privilege log with an initial Rule 34 response. See *Charles O. Bradley Trust v. Zenith Capital LLC*, 2005 WL 1030218 at *2 (N.D. Cal. May 3, 2005).

Even if, in the future, practitioners are fully aware of the Ninth Circuit's decision, they will find little guidance or protection in the court's "holistic reasonableness" rule. In fact, the Ninth Circuit's "rule" is really no rule at all. Instead, it is an open invitation to Monday morning quarterbacking — often by

magistrates who are weary of complicated privilege debates and may be tempted to avoid *in camera* examination of large numbers of documents by the simple expedient of declaring all privileges waived because the privilege log was untimely. *Cf. American Nat'l Bank & Trust Co. v. Equitable Life Assur. Soc'y*, 406 F.3d 867, 878-80 (7th Cir. 2005).

In denying BNSF's petition for rehearing, the Ninth Circuit suggested that the uncertainties created by its new rule could be avoided in the future by obtaining an extension of time in which to submit a privilege log. But that suggestion illustrates how the Ninth Circuit's new rule will create a discovery environment of delay and deferral. Parties who cannot produce a complete privilege log within 30 days — which is to say every defendant in complex civil litigation — now must move the trial court for an extension of time for their Rule 34 response. Furthermore, the Ninth Circuit's approach will necessarily slow the production of unprivileged documents by making the creation of the privilege log — rather than the expeditious production of documents — the priority. Neither Rule 34 requesters nor responders will benefit from such an upside-down result.

The Ninth Circuit's view that waiver results merely from "unreasonable" delay in providing a complete privilege log also bodes ill for litigants and their counsel who fail to find a privileged document when the first round of document review is conducted. Adding a new document to a privilege log would inevitably raise the question whether, in retrospect, the document could have been identified earlier and whether the failure to do so should therefore be deemed a waiver. To impose such a draconian sanction on a party for such routine oversights would serve to encourage the very "gamesmanship" the Ninth Circuit sought to avoid.

Privileges are too important to be treated so lightly. In *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), this

Court explained that the attorney-client privilege serves a vital function in our legal system:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. [Citation omitted.] Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Similarly, in *Hickman v. Taylor*, 329 U.S. 495, 516 (1947), Justice Jackson explained the importance of shielding attorney work product from discovery:

> [A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. . . . I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him.

Given the broad scope of today's customary discovery requests, it is inevitable that privilege issues will arise in virtually every case. Thus, it is critical that the rules for withholding documents on privilege and work product grounds be both clear and appropriately balanced between efficiency and protection of the vital interests served by the privilege and work product doctrine. The Ninth Circuit's decision in this case does not achieve either result. On the contrary, it serves only to increase the confusion surrounding the assertion of privileges and to heighten the risk that important privileges will be inadvertently waived.

This Court should grant certiorari to resolve that confusion and to decide (i) what steps a litigant must take in order to properly assert privilege and work product objections in response to discovery requests and (ii) under what circumstances privileges may be forfeited by a failure to comply with those requirements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2005